

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)
Telecommunications Act of 1996)

CC Docket No. 96-238

Amendment of Rules Governing)
Procedures to be Followed)
Upon Formal Complaints Are)
Filed Against Common Carriers)

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COMMENTS

Teleport Communications Group, Inc. ("TCG") files these Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 96-460 (rel. Nov. 27, 1996) ("NPRM"). TCG supports in broad measure the proposals the Commission sets forth in the NPRM for revising its rules governing formal complaints, in light of the stringent schedules established by the Telecommunications Act of 1996. In these Comments, TCG will address certain aspects of the NPRM, primarily the Commission's proposals regarding standards for filing complaints, and for streamlining the discovery process and bifurcating the liability and damages phases of complaint proceedings.

I. THE COMPLAINT PROCESS CAN BE STREAMLINED WITHOUT JEOPARDIZING THE RIGHT OF PARTIES TO FILE COMPLAINTS

TCG agrees that "one of the key elements to streamlining the enforcement process is to maximize staff control over the discovery process," and therefore "the burden of developing an adequate record" should be borne by parties "earlier

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in the proceeding, upon the filing of the initial pleadings."¹ Given the new deadlines, it is clearly appropriate to require that complainants diligently research the basis for their complaints before filing them. The Commission must recognize, however, that a complainant may not possess documentary evidence prior to filing its complaint. Instead, the complainant may have credible information which, if proved, can provide grounds for relief.

For instance, before filing its complaint a party likely would not possess documents showing that a local exchange carrier ("LEC") is failing to provide certain interconnection arrangements to it relative to the arrangements provided to other interconnectors in a non-discriminatory manner as required by Sections 251 and 202(a) of the Act. However, a complainant may very well have substantial information from its employees and other individuals strongly indicating that the defendant is engaging in discriminatory practices. In the course of the proceeding, and through the discovery process, a complainant can substantiate its claims. For this reason, parties should not be prohibited from filing complaints that "rely solely on assertions based on 'information and belief.'"²

The Commission certainly has a legitimate interest in deterring parties from filing frivolous complaints, but that goal can be achieved without chilling the exercise of complainants' rights. Accordingly, the Commission properly could require that a complaint based solely on "information and belief" be supported by

1. NPRM at ¶ 49.

2. Id. at ¶ 38.

affidavits verifying a good faith basis for a claim, and complaints must of course establish a cause of action. But a party should not be precluded from filing a complaint merely because it must rely initially on assertions of information and belief.

II. DUE PROCESS REQUIRES THAT PARTIES BE PERMITTED DISCOVERY AS A MATTER OF RIGHT

Requiring parties to investigate the factual and legal bases for their complaints in advance would also reduce the need for discovery. However, TCG disagrees with the Commission's suggestion that self-executing discovery should be permitted only at the discretion of the Staff and prohibited as a matter of right, in order to streamline the complaint process.³ Pre-filing investigations, no matter how thorough, inevitably have limitations beyond the control of complainants. Important documents and justifications concerning a defendant LEC's rates and practices are commonly in the exclusive possession of the LEC and can only be obtained by a complainant through the discovery process. Complainants therefore need a certain degree of self-executing discovery as a matter of right in order to obtain the information they need to establish their claims.

Experience teaches that self-executing discovery is crucial to the elucidation of evidence and the production of a useful record, in order to guarantee parties due process. At the same time, the Commission can ensure that such discovery is conducted efficiently, consistent with the time constraints imposed by the

3. Id. at ¶ 50.

Telecommunications Act of 1996. TCG thus agrees with the Commission's suggestion that useful self-executing discovery can be accomplished through fewer than thirty (30) written interrogatories.⁴ Reducing the number of written interrogatories to twenty (20) should be sufficient to allow parties to secure necessary information.

To ensure that discovery proceeds expeditiously, the Commission should adopt rules establishing dates for the filing of interrogatories and objections to interrogatories in advance of the initial status conference. The Commission should also provide that, at the initial status conference, the Staff would rule on objections to interrogatories on traditional evidentiary grounds -- e.g., burden, relevance, etc.⁵ -- and set the schedule for responses to interrogatories.

The foregoing approach would reasonably balance the due process interests of parties and the Commission's interest in efficiently managing the complaint process, and is preferable to burdening the Staff with the responsibility of determining on its own motion the scope and extent of the discovery that a complainant needs in order to prosecute its claim. Complainants are clearly in a better position to know their initial discovery needs, and the Staff can appropriately resolve any discovery disputes.

Expediting the discovery process and reducing the burdens on the Staff might also be accomplished by delegating to Administrative Law Judges ("ALJs"),

4. Id. at ¶ 51.

5. Id. at ¶ 52.

rather than the Staff, the responsibility for resolving discovery disputes and for setting discovery schedules. Involving ALJs in complaint proceedings in this manner would be consistent with the Commission's intention to employ ALJs to resolve disputes over material facts, a proposal TCG supports.⁶ By giving ALJs these administrative responsibilities, the Commission could also afford the Staff more time to devote to its important decision-making duties.

However, the complaint process would not be improved by allowing parties to stipulate "to a cost-recovery system as a basis" for exchanging information, with the losing party agreeing to bear the costs of such discovery, including attorneys fees.⁷ Such stipulations would be rare, and it would be counterproductive for the Commission to even entertain such arrangements. Defendants might be tempted to resist responding to discovery requests unless they are compensated and to embroil the Staff in fruitless negotiations over stipulations as a strategy designed to slow down the timely prosecution of complaints and the compilation of an adequate record. These tactics would also deny the Commission adequate time to give complaints careful consideration, consistent with the new timetables. The Commission therefore should continue to require that each party to bear the cost of responding to discovery requests. The Staff can adequately ensure that discovery is not unfairly burdensome and costly.

6. Id. at ¶ 56.

7. Id. at ¶ 54.

III. BIFURCATING COMPLAINTS INTO LIABILITY AND DAMAGES PHASES IS APPROPRIATE

TCG supports the Commission's suggestion that parties be permitted to bifurcate the liability and damages phases of their complaints by filing supplemental complaints once liability has been determined.⁸ Complaints are commonly bifurcated at the present time. Allowing parties to initially address liability issues clearly would be more efficient than requiring them and the Staff to expend time and resources needlessly on damages issues before there has been a determination of liability.

TCG therefore agrees that "[w]here a Complainant voluntarily bifurcates a complaint proceeding, the Commission would defer adjudication of all damages issues until after a finding of liability. This approach would enable the Commission to make a liability finding within the statutory deadline and still preserve the complainant's right to a damage award."⁹ As the Commission notes, "[b]ifurcation would enable the parties and the Commission to focus efforts to ensure that important service provisioning and other marketplace issues are resolved expeditiously, consistent with the pro-competitive goals and objectives underlying the complaint resolution deadlines contained in the 1996 Act."¹⁰

8. Id. at ¶ 63.

9. Id. at ¶ 64.

10. Id. at ¶ 65.

IV. CONCLUSION

For the reasons stated above, the Commission should adopt the foregoing recommendations.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP, INC.

A handwritten signature in cursive script, reading "Teresa Marrero", is written over a horizontal line.

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January 6, 1997